Supreme Court, U.S.
FILED

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In The Supreme Court Of The United States

OCTOBER TERM, 1994

LAWRENCE M. BRAWNER

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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49 pp

QUESTIONS PRESENTED

1. In affirming the petitioner's conviction in the trial court, did the Fourth Circuit of Appeals fail to correctly apply the "plain error" doctrine found in Fed. R. Civ. P. 52?

2. In affirming the petitioner's conviction in the trial court, did the Fourth Circuit disregard settled precedent in its circuit found in U.S. v. Chase, 372 F2d 453 (4th Cir 1967)?

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18 U.S.C. §924

18 U.S.C. §3231

21 U.S.C. §841

21 U.S.C. §846

21 U.S.C. §861

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III. RULES:

Federal Rules of Evidence 401 - 403

Federal Rules of Civil Procedure, Rule 52

OFFICIAL REPORTS OF OPINIONS

On September 18, 1992, the United States District Court for the Eastern District of Virginia entered a final judgment of conviction against Lawrence Brawner under 21 U.S.C. §841 and 28 U.S.C. 846. Appendix 1-3. Thereafter, Brawner appealed his conviction to the Fourth Circuit Court of Appeals, which, pursuant to an unpublished opinion, dated December 20, 1993, affirmed Brawner's conviction in the trial court. Appendix 4-6.

STATEMENT OF JURISDICTION

Jurisdiction for the United States District Court was invoked pursuant to 18 U.S.C. §3231. Jurisdiction in the Fourth Circuit Court of Appeals was invoked under 28 U.S.C. §1291, and Brawner timely appeals to this court pursuant to Supreme

Court Rule 10.

DISTRICT COURT JURISDICTION

On April 23, 1992, pursuant to a criminal complaint filed on April 14, 1992, the United States of America (United States) obtained an indictment charging Lawrence Brawner (Brawner) with violating 21 U.S.C. §841, 21 U.S.C. §846, 18 U.S.C §924, and 21 U.S.C. §861. The complaint alleged that Brawner knowingly possessed a controlled substance ("crack" cocaine) with the intent to distribute; knowingly possessed and used a firearm during and in relation to a drug trafficking crime; knowingly persuaded a person under eighteen years of age to possess "crack" cocaine; and that Brawner conspired with others to commit these offenses. Jurisdiction of the United States District Court for the Eastern District of Virginia was thereby invoked

under 18 U.S.C. §3231.

APPELLATE JURISDICTION

On July 9, 1992, in the United States District Court for the Eastern District of Virginia, Alexandria Division, a jury returned a verdict finding Lawrence Brawner guilty of possession with intent to distribute more than fifty grams of a controlled substance in violation of 21 U.S.C. §841, and conspiracy to possess and distribute more than fifty grams of a controlled substance in violation of 28 U.S.C. §846. On September 18, 1992, the District Court entered a final judgment of conviction and sentenced Brawner to 121 months in federal prison on each count (to run concurrently). On September 22, 1992, Brawner filed a timely Notice of Appeal with the District Court. The

jurisdiction of this court is invoked under 28 U.S.C. §1291.

STATUTES

18 USCS § 924

§ 924. Penalties

(a) Whoever violates any provision of this chapter [18 USCS §§921 et seq.] or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter [18 USCS §§921 et seq.] to be kept in the records of a person licensed under this chapter [18 USCS §§921 et seq.], or in applying for any license or exemption or relief from disability under the provisions of this chapter [18 USCS §§921 et seq.], shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined not more than $10,000, or imprisoned not more than ten years, or both.

(c) Whoever-

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of

the United States,

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

(d) Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter [18 USCS §§921 et seq.] or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 [26 USCS § 1 et seq.] relating to the seizure forfeiture and disposition of firearms, as defined in section 5845(a) of that Code [26 USCS §5845(a)], shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter [18 USCS §§ 921 et seq.].

(Added June 19, 1968, P. L. 90-351, Title IV, § 902, 82 Stat. 233; Oct. 22, 1968 P. L. 90-618, Title I, § 102, 82 Stat. 1223;

Jan. 2, 1971, P. L. 91-644, Title II, § 13, 84 Stat. 1890.)

21 USCS § 841

§ 841. Prohibited acts A

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties. Except as otherwise provided in section 405 [21 USCS § 845], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 year, a fine of note more than $50,000, or

both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at lease 6 years in addition to such term of imprisonment. (B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4), (5), and (6) of this subsection, be santenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment. (2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more

than $10,000. or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title, or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.
(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine or not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 year, a fine of not more than $10,000, or both.
(4) Notwithstanding paragraph (1) (B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana

for no remuneration shall be treated as provided in subsections (a) and (b) of section 404 [21 USCS § 844(a), (b)].

(5) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, except as authorized by this title, phencyclidine (as defined in section 310(c)(2) [21 USCS § 830(c)(2)]) shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this title to title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(6) In the case of a violation of subsection (a) involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years,

and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this title, title III, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.

(c) Special parole term. A special parole term imposed under this section or section 405[2] USCS § 845] may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 405 [21 USCS § 845] shall be in addition to, and not in lieu of, any other parole provided for by law.

(d) Piperidine offenses and penalty. Any person who knowingly or intentionally--

(1) possesses any piperidine with intent to manufacture phencyclidine except as authorized by this title, or

(2) possesses any piperidine knowing, or having reasonable cause to

believe, that the piperidine will be used to manufacture phencyclidine except as authorized by this title,

shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both.

(Oct. 27, 1970, P. L. 91-513, Title II, Part D, § 401, 84 Stat. 1260; Nov. 10, 1978, P. L. 95-633, Title II, § 201, 92 Stat. 3774; Sept. 26, 1980, P. L. 96-359, § 8(c), 94 Stat. 1194.)

28 USCS §1291

§1291. Final decisions of district courts

The courts of appeals (other than the United Stats Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].
(June 25, 1948, ch 646, § 1, 62 Stat. 929; Oct. 31, 1951, ch 655, § 48 65 Stat. 726; July 7, 1958, P. L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, P. L. 97-164, Title I, Par A., § 124, 96 Stat. 36.)

§ 3231. District Courts

The District Courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.
Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.
(June 25, 1948, ch 645 § 1 62 Stat. 826.)

Rule 401. Definition of "Relevant Evidence." "Relevant evidence" means

evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, needless presentation of cumulative evidence.

21 USCS § 846

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.
(Oct. 27, 1970, P. L. 91-513, Title II, Part D, § 406, 84 Stat. 1265.)

STATEMENT OF THE CASE

The central issue in this appeal involves the erroneous admission of evidence of telephone conversations between Brawner and Leon Stokes (a government agent and alleged co-conspirator who had been previously arrested) in support of the conspiracy charge against Brawner, and the plain error of the trial court and the Fourth Circuit Court of Appeals in construing the failure of the trial court to properly instruct the jury, resulting in the imposition of a 10-year sentence of the petitioner. These conversations were inadmissible and irrelevant based on the legal premise that Brawner could not conspire with a government agent. In addition, Stokes had been arrested on February 10, 1992 (approximately two

months prior to the telephone conversations at issue), and Brawner was therefore incapable, as a matter of law, of conspiring with Stokes after Stokes' arrest.

Further, if the telephone conversations are deemed admissible, and as indicated above, the trial court erred in failing to instruct the jury that Brawner could not conspire with Stokes after February 10, 1992, the date of Stokes' arrest and the date after which Stokes became a government agent. Accordingly, the judgment of conviction against Lawrence Brawner should be vacated, and Brawner should be given a new trial in conformity with applicable legal principles governing the substance of this appeal. In affirming the rulings of the trial court, the Fourth Circuit

Court of Appeals ignored the factual underpinnings of the trial court's erroneous rulings in derogation of Fed. R. Civ. P. 52, and controlling authority found is U.S. v. Chase, 372 F.2d 453 (4th Cir. 1967).

STATEMENT OF THE CASE AND STATEMENT OF RELEVANT FACTS

On February 10, 1992, officers T.A. Baumker, Douglas Cooke, and Theodore Dragan of the Fairfax County Police Department went to 3331 Carlyn Court, Apartment 2, in Falls Church, Virginia, to serve a juvenile warrant charging Clifford Smith with malicious wounding. Larry Armstrong allowed the officers into the apartment, and they encountered Leon Stokes. Baumker, recognizing Stokes as an individual with a reputation for being "frequently armed" and "related to

frequent drug activity," drew his service weapon. Stokes then told Baumker and Cooke that he was the only person who lived in the apartment.

Baumker and Dragan then located Smith in the kitchen and arrested him. Brawner was not in the apartment at the time of the arrest.

After Stokes, Armstrong, and Smith's arrests, the investigating officers searched the apartment and found two handguns, drug paraphernalia, marijuana and crack cocaine. Two brown paper bags containing cocaine were found in one closet in the apartment and plastic bags containing cocaine were found in another closet. Also, bills and other documents with Brawner's name were found in a pair of tan pants in the apartment.

Armstrong and Stokes were initially

charged with state narcotics violations, however, these charges were subsequently dismissed when the United States filed more severe federal charges under 21 U.S.C. §841, 21 U.S.C. §846, 18 U.S.C. §924 and 21 U.S.C. §861.

Shortly after the United States initiated federal charges against Stokes and Armstrong, Stokes claimed that Brawner was the source and supplier of the crack cocaine found in the apartment.[1] Stokes then entered into a plea agreement with the United States under which he pled guilty to the drug conspiracy charge and agreed to assist the United States in obtaining evidence

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[1] Stokes also candidly admitted that he had previously been involved in drug activity while living in Knollwood Court in Falls Church, Virginia, and stated that at that time, that Brawner was not his supplier.

implicating Brawner in drug activity and to testify against Brawner in criminal proceedings. The United States in turn promised to drop the remaining charges against Stokes and to forego further prosecution for offenses arising from the conduct charged in the information.

On April 2 and 3, 1992, in compliance with the terms and conditions of his plea agreement, and at the direction of Officer Robert Bowen of the Northern Virginia crack task force section of the Drug Enforcement Agency, Stokes placed six telephone calls to Brawner and had conversations with Brawner on three of those occasions. According to Officer Bowen, the calls were for the purpose of "setting up . . . so that the buy could be properly covered by law enforcement personnel. An arrest

was going to be subsequent to the buy."

In those conversations, Stokes initially broached the subject of a prospective drug purchase involving Brawner, and Stokes and Brawner thereafter discussed the details of the government-orchestrated purchase. No such buy ever occurred.

On April 14, 1992, based upon Stokes' statements and the telephone conversations, Brawner was arrested and charged with the offenses enumerated above.[2] Bowen testified that at the time of the arrest "the only thing that was found on [Brawner's] person at that point

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[2] The only direct non-testimonial evidence linking Brawner to cocaine was one latent fingerprint found on a brown paper bag found in Stokes' apartment which contained glassine baggies containing of 12.65 grams of cocaine. A number of Stokes' fingerprints were also found on the bag.

in time was the pager." There were no records, tools, no significant amounts of money, no drugs, no paraphernalia or anything related to drug activity on Brawner's person.

At trial, over Brawner's objection, Stokes recounted the substance of the telephone conversations, and transcripts of those conversations were published to the jury. In recounting the conversations, Stokes offered his own interpretation of the conversation between Brawner and Stokes.

At the close of the government's case, Brawner moved for a judgment of acquittal on the ground, inter alia, that the telephone conversations of April 2nd and 3rd could not be used to establish a conspiracy under 21 U.S.C. §426 because Stokes had been arrested and was a

government agent. The court acknowledged that Stokes was a government agent, but mistakenly concluded that Stokes was arrested and became a government agent in April, when in fact, Stokes had been arrested on February 10, some two months prior to the telephone conversations.

In addition, the court ruled that there could be an ongoing conspiracy between Brawner, Armstrong, Stokes and Smith notwithstanding that Armstrong and Smith had previously been arrested on February 10, 1992. The court then denied Brawner's motion for judgment of acquittal on that ground.

The court, having previously ruled in error that: 1) that the alleged conspiracy continued through April 3, 1992; 2) that the arrested co-conspirators were legally capable of

conspiring with Brawner; and 3) that Stokes became a government agent in April; failed to instruct the jury that Stokes could not be a co-conspirator with Brawner after February 10, 1992, the date of Stokes' arrest.

On July 9, 1992, the jury returned a verdict acquitting Armstrong of all charges, acquitting Brawner of the "gun" and "minor" charges (18 U.S.C. §924 and 21 U.S.C. §861, but found him guilty of conspiracy under 21 U.S.C. §846 and the possession with intent charge under 21 U.S.C. §841.) Brawner thereafter appealed his conviction to the Fourth Circuit Court of Appeals.

On December 20, 1993, the Fourth Circuit Court of Appeals affirmed the conviction and rulings of the District Court on the ground, among other things,

that: 1) that statements in the transcripts were properly admitted to show intent and knowledge of the alleged conspiracy; and 2) that the District Court did not commit plain error by not instructing the jury that Stokes was not a coconspirator during the conversations. It is from the opinion of the Fourth Circuit that Brawner has appealed to this court.

ARGUMENT

I. The admission into evidence of the Brawner/Stokes telephone conversations was an abuse of discretion and reversible error.

At trial, the government offered transcripts of the Brawner/Stokes telephone conversations as evidence that Brawner had conspired to possess and distribute "crack" cocaine. Brawner objected on the grounds that they were irrelevant under F.R.E. 401 and 402 and prejudicial under F.R.E. 403 because Stokes had ceased as a matter of law to be capable of conspiring. In support of the objection, he cited United States v. Chase, 372 F.2d 453 (4th Cir. 1967),[3]

[3] Chase involved a prosecution charging conspiracy to violate statutory prohibitions against interstate transmission of wagering information,

where an alleged co-conspirator after being arrested and admitting his guilt, had agreed to aid the police in gathering evidence against the defendant. After the arrest, the alleged co-conspirator communicated with the defendant and arranged to resume taking bets for a pool. After evidence of these communications was admitted, Defendant was convicted of conspiracy to violate the anti-betting statutes.

In reversing the conspiracy conviction, the Fourth Circuit stated:

> It is undisputed that all of the defendants named in the second indictment, except Chase, were arrested on April 5th, and that after April 5th, **none of the defendants except Chase and Carr, in his role as a government informer,**

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traveling in interstate commerce in aid of gambling, and interstate transportation of gambling paraphernalia and other violations. Id. at 453.

> **engaged in any betting activities.** The government essentially concedes that a conspiracy ends as to a particular co-conspirator upon his arrest.... The conclusion is thus inescapable that, on April 5, 1965, the conspiracy...ceased, because Chase could not conspire with himself, and there was no other person with whom he could conspire. Carr, Parrish, Roy, et. al., legally could no longer be co-conspirators because they had been arrested. Id. at 459.

The court also stated that because Carr was acting as a government agent and had entered into a "secret role" he could not be a co-conspirator. Id., citing Sears v. United States, 343 F.2d 139 (5th Cir. 1965).

The rule that there can be no conspiracy involving only the defendant and government agents or informers has been adopted by every circuit addressing the issue. See, United States v. Barboa, 777 F.2d. 1420, 1422 (10th Cir. 1985),

citing Chase, United States v. Escobar de Bright, 742 F.2d 1196 (9th Cir. 1984), et. al. Escobar de Bright explained:

> A conspiracy is an agreement between two or more people to commit an unlawful act, and there is no real agreement when one "conspires" to break the law only with government agents or informants. Id., at 1199.

The court in Escobar de Bright further stated that the rule was to deter the "manufacturing of crime which might occur if the mere presence of government agents could create indictable conspiracies. Id., at 2000.

The facts here are nearly identical to those in Chase. Stokes, Armstrong, and Smith were arrested on February 10, 1992; therefore, by operation of law they could not after that date conspire with Brawner. Stokes had agreed to work for the U.S. Government by gathering evidence

against Brawner. Thus, he had effectively become a government agent and was incapable of being a co-conspirator.

The transcripts of the telephone conversations were arguably relevant only to show that Brawner conspired with Stokes to possess and distribute cocaine. However, since neither an arrestee nor a government agent is capable of conspiracy the tapes were manifestly irrelevant. The gravity of the court's error in admitting the transcripts can be fully appreciated only if viewed in light of all the evidence at trial and the jury's verdict. First, the transcripts were clearly the most damaging evidence against Brawner because they depicted him discussing possible drug transactions. With the exception of an insignificant

fingerprint on a baggie[4], the telephone transcripts were the only credible direct evidence connecting Brawner with the cocaine. Brawner was not at the Falls Church apartment the night Stokes, Armstrong, and Smith were arrested. It was only through the finger pointing of the arrested Stokes that Brawner became a suspect.

It is evident from the jury's verdicts that the admission of the transcripts was fatal to Brawner's defense. The indictment against Brawner alleged that he had conspired with

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[4] Subsequent to the arrests of Stokes, Armstrong, and Smith at the apartment at 3331 Carlyn Court, officers seized numerous items, including; a bag of marijuana, 3 bags of crack cocaine, several firearms, etc. (see exhibit "B" attached). However, Brawner's fingerprint was recovered from only one empty, plain paper bag.

Armstrong, Stokes and other unnamed co-conspirators. No evidence of any "unnamed" co-conspirators was offered at trial.[5] Also, in acquitting Armstrong, the jury implicitly found that Brawner did not conspire with Armstrong. Therefore, by process of elimination, the jury must have concluded that Brawner conspired with Stokes. Under these circumstances, the court cannot reasonably conclude that Defendant would have been convicted if the evidence had been excluded. The error was manifestly harmful.

II. Even if the Brawner/Stokes transcripts were admissible, the court committed reversible error in failing to give a

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[5] The government bears the burden of proving the existence and continuation of a conspiracy. U.S. v. Morris, 781 F.Supp. 428, 439 (E.D.Va. 1991).

protective instruction to the jury.

The defendant "is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." United States v. Young, 464 F.2d 160, 164 (5th Cir. 1972) (quoting Tatum v. United States, 190 F.2d 612, 617 (D.C. Cir. 1951).

In United States v. Lively, 803 F.2d 1124 (11th Cir. 1986), the court found reversible error in the failure to instruct the jury on the inability of a government informer to conspire with another person. In Lively, Richards, an alleged co-conspirator, who had been arrested on charges stemming from the

possession of cocaine and drug paraphernalia found in his house, agreed to cooperate with Drug Enforcement Administration (DEA) officials in their investigation of Lively. Richards wore a transmitting device placed on him by a DEA officer when he went to Lively's house to close a drug deal. The transcripts of their conversations were introduced at Lively's trial.

At trial, Lively requested the following instruction:

> Members of the jury, you are hereby instructed that after their arrest of David Richards on March 24, 1985, he became the Government's agent and informer and thereafter could not be a co-conspirator with William David Lively because one who acts as a government agent and enters into a purported conspiracy in the secret role of an informer cannot be a co-conspirator. Id., at 1126.

In reversing the conviction, the court stated, "Without an instruction on the

Sears rule, however, the jury may well have believed that it could convict [Lively] for "conspiring" with Richards after March 24."[6]

In United States v. Hayes, 775 F.2d 1279, 1283 (4th Cir. 1985), the 4th Circuit ruled that the district judge was correct in giving a protective instruction to the effect that if they found the individual to be an agent at the time of the alleged conspiracy, they were required to find him not guilty of conspiracy. Id.

The facts in Lively and Brawner's case could not be more similar. Stokes arrest and agreement to become a government informant mandated that jury

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[6] The propositions of Chase are derived from, and in fact are the same as, the "Sears rule."

instructions be given concerning the inability of an arrested individual to conspire and the inability of a government agent to conspire.

No such protective instruction was given in Brawner's case. Had such an instruction been given, Brawner would almost certainly been acquitted. As such, the district court committed plain error under Fed. R. Civ. P. 52, and the Fourth Circuit failed to acknowledge or rectify that plain error as it is required to do under applicable authority See U.S. v. Olono, 113 U.S. 1770 (1993).

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this court grant his petition for a writ of certiorari in this case, and reverse

the judgment of conviction of the U.S. District Court, and the affirmation of that conviction by the Fourth Circuit Court of Appeals.

Respectfully submitted,

Lawrence Brawner
By Counsel

Whitestone, Brent,
Young & Merril, P.C.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the requisite number of copies of the foregoing were mailed to:

Dwight P. Bostwock, Esquire
Office of the U.S. Attorney
1101 King Street
Alexandria, Virginia 22314

Robert C. Whitestone, Esquire

APPENDIX

United States District Court

EASTERN District of VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA
V

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: CR92-00173-A(02)

LAWRENCE M. BRAWNER
(Name of Defendant)

Robert C. Whitestone, Esquire
Defendant's Attorney

DEFENDANT:

eaded guilty to count(s): _____
as found guilty on count(s) 1 and 3 of the Indictment after a
ea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Section	Nature of Offense	Date Offense Concluded	Count Number(s)
.S.C. §846	Conspiracy to possess with intent to distribute and to distribute 50 grams or more of "crack" cocaine (Sch. II)	4-92	1
.S.C. §841(a)(1) & 1)(A)(iii)	Possession with intent to distribute 50 grams or more of "crack" cocaine (Sch. II)	2-92	3

'e defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is ed pursuant to the Sentencing Reform Act of 1984.

e defendant has been found not guilty on count(s) 2 and 4 of the Indictment
d is discharged as to such count(s).
unt(s) _____ (is)(are) dismissed on the motion of the United States
s ordered that the defendant shall pay a special assessment of $ 100.00($50.00 each) for count(s): 1 and 3 of the Indictment, which shall be due ☐ immediately ☒ as follows: during the rm of supervised release
'IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within /s of any change of name, residence, or mailing address until all fines, restitution, costs, and special sments imposed by this judgment are fully paid.

ant's Soc. Sec. No.: 230-96-9816

ant's Date of Birth: 07-25-92

September 18, 1992
Date of Imposition of Sentence

ant's Mailing Address:
20 Belvedere Drive
exandria, VA 22306

Signature of Judicial Officer
Albert V. Bryan, Jr.
U.S. District Judge
Name & Title of Judicial Officer

ant's Residence Address:
Same as above

te September 18, 1992
Date

App

Defendant: LAWRENCE M. BRAWNER
Case Number: CR92-00173-A(02)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of one hundred and twenty-one(121) months.

This term consists of terms of one hundred and twenty-one(121) months on each of Counts 1 and 3 to run concurrently with each other.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _____ a.m. / p.m. on _____
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on _____
- ☒ as notified by the United States Marshal.
- ☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____

_____, with a certified copy of this judgment.

_____
United States Marshal

App

By _____
Deputy Marshal

Defendant LAWRENCE M. BRAWNER Judgment—Page ___ of ___
Case Number CR92-00173-A(02)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five

5 years

This term consists of terms of five (5) years on each of Counts 1 and 2 to run concurrently with each other

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☐ The defendant shall not possess a firearm or destructive device.

The defendant shall pay the assessment provided for in this judgment during the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) The defendant shall support his or her dependents and meet other family responsibilities;
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) The defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LAWRENCE M. BRAUNER,
Defendant-Appellant.

No. 92-5729

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(CR-92-173-A)

Submitted: August 30, 1993

Decided: December 20, 1993

Before MURNAGHAN, WILKINSON, and WILLIAMS,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Robert C. Whitestone, Robert J. Cunningham, Jr., Jeffrey D. Brown, Third Year Practice, WHITESTONE, BRENT, YOUNG & MERRIL, P.C., Fairfax, Virginia, for Appellant. Kenneth E. Melson, United States Attorney, Dwight P. Bostwick, Special Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Lawrence M. Brawner appeals his convictions of one count of conspiracy to distribute crack cocaine in violation of 21 U.S.C. § 846 (1988), and one count of possession with intent to distribute crack cocaine in violation of 21 U.S.C. § 841 (West 1981 & Supp. 1993). Brawner claims that the district court erred in admitting transcripts of taped conversations between himself and a former co-conspirator turned government agent, Leon Stokes. He also contends that the district court committed plain error by not instructing the jury that at the time of the conversations there could be no conspiracy between Stokes and Brawner because Stokes was an agent of the police. We find no error and affirm Brawner's convictions.

At trial, the Government introduced transcripts of three taped conversations between Brawner and Stokes relating to Brawner's ongoing drug activity, his drug use, and a potential drug sale between Brawner and Stokes. The conversations occurred after Stokes was arrested and had entered a guilty plea. Because Stokes was not a conspirator at the time of the conversations, Brawner asserts that the transcripts were erroneously admitted to show a conspiracy between the two. Incriminating statements by a conspirator after the conspiracy is over are admissible against the declarant, *Lutwak v. United States*, 344 U.S. 604, 618 (1953), and the statements and actions by a conspirator after the conspiracy is over can properly be admitted to show intent and knowledge of the conspiracy. *United States v. Chase*, 372 F.2d 453, 460-61 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967). This is especially true where the statements are made to a former conspirator, involve the same types of transactions as alleged in the conspiracy, and are in close proximity to the conspiracy. *Id.* The transcripts were not introduced to show a conspiracy between Stokes and Brawner at that time, but to establish that Brawner had engaged in a conspiracy with Stokes in the past, and that Brawner was still engaged

in a conspiracy with others to sell cocaine. Hence, the district court did not err in admitting the transcripts.

Brawner's second claim is that the district court committed plain error by not instructing the jury that Stokes was not a co-conspirator during the conversations.* He contends that admission of the transcripts led to his conspiracy conviction. An error constitutes plain error if it is so prejudicial to a substantial right that it undermines the fairness of the trial and contributes to a miscarriage of justice. *United States v. Reedy*, 990 F.2d 167, 168 n.2 (4th Cir. 1993) (citation omitted).

Because there was evidence other than the transcripts of the conversations to support Brawner's role in the conspiracy, Brawner was not prejudiced by the court's refusal to give the instruction. Stokes testified as to Brawner's participation in the drug distribution enterprise, a bag containing cocaine found in Stokes' apartment had Brawner's fingerprint on it, and Brawner's social security card and other identification cards were found with drug paraphernalia in Stokes' apartment. Additionally, it was shown at trial that Brawner had no legitimate source of income during the time of the alleged conspiracy. Thus, the transcripts were not unduly prejudicial, and the district court's refusal to give a jury instruction on the issue was not plain error.

We affirm Brawner's convictions. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

*Brawner's counsel did not object to the absence of such a jury instruction at trial.